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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN,
SECRETARY OF LABOR, APPELLANT

v.

DOROTHY BLITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Daniel Amendment, which prohibits persons who advocate the violent overthrow of the United States government from participating in a program under the Comprehensive Employment and Training Act, and is interpreted by the Secretary of Labor to apply only where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action, violates the First Amendment.

2. Whether, in view of the administrative procedures, culminating in review by the courts of appeals, provided by Congress to consider complaints concerning the administration of programs under the Comprehensive Employment and Training Act, appellee's claim that she was unlawfully excluded from a CETA program was properly brought directly in the district court.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-12a) is reported at 538 F. Supp. 1119.

JURISDICTION

The order of the district court (App. B, *infra*, 13a) was entered on May 14, 1982, and a notice of appeal to this Court (App. C, *infra*, 14a) was filed on June 9, 1982. On July 29, 1982, Justice Brennan extended the time for docketing the appeal to October 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATUTE INVOLVED

Pub. L. No. 97-92, 95 Stat. 1183,[1] provides in part:

> None of the funds appropriated or otherwise made available by this Act may be used, pursuant to the Comprehensive Employment and Training Act, for the participation of individuals who publicly advocate the

[1] See page 3 note 2, *infra*.

violent overthrow of the Federal Government, or who have, within the past five years, publicly advocated the violent overthrow of the Federal Government.

STATEMENT

1. The Comprehensive Employment and Training Act of 1973 (CETA) is designed to "provide job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons" through a "decentralized system of Federal, State and local programs." 29 U.S.C. (Supp. IV) 801. Most CETA programs are administered at the local level by a "prime sponsor"—generally, a unit of state or local government. 29 U.S.C. (Supp. IV) 811; see 29 U.S.C. (Supp. IV) 841 *et seq.* The Secretary of Labor has overall responsibility for administering the Act.

CETA requires every prime sponsor to "establish and maintain a grievance procedure * * * for handling complaints about the program arising from its participants * * * and other interested persons." 29 U.S.C. (Supp. IV) 816(a)(1). The Act provides that a prime sponsor must hold a hearing within 30 days after a grievance is filed and must render a decision on the grievance within 60 days after it is filed (29 U.S.C. (Supp. IV) 816(a)(1)). The Secretary of Labor has issued regulations governing the prime sponsors' grievance procedure. 20 C.F.R. 676.83, 676.84.

After exhausting the prime sponsor's remedy, a party may file a complaint with the Secretary. 29 U.S.C. (Supp. IV) 816(b). The Act requires the Secretary to investigate the complaint; if the Secretary finds substantial evidence that a prime sponsor or other recipient of funds is not complying with the Act, he must hold a hearing to determine whether the allegations in the complaint are true (29 U.S.C. (Supp. IV) 816(b)). Regulations provide that this hearing, if requested, will be held on the record before an Administrative Law Judge. 20 C.F.R. 676.88(f). The parties have the right to subpoena witnesses and to discovery according to the Federal Rules of Civil Procedure. 20 C.F.R. 676.89(e). The Secretary is authorized to take a wide range of corrective measures, including revocation of

a prime sponsor's CETA plan and a cut off of funds, if he finds that a sponsor has violated the Act or its implementing regulations. See 29 U.S.C. 816(c)-(g).

The Act provides that "any interested person [who] is dissatisfied with or aggrieved by any final action of the Secretary" taken under the Act's grievance procedure may file a petition for review in the appropriate United States court of appeals. 29 U.S.C. (Supp. IV) 817(a). The court of appeals may set aside the Secretary's action if it is not supported by substantial evidence (29 U.S.C. (Supp. IV) 817(b)).

2. In December 1981, as part of a statute appropriating funds for the Department of Labor, Congress enacted the Daniel Amendment, which prohibits the expenditure of CETA funds in connection with "the participation of individuals who publicly advocate the violent overthrow of the Federal Government, or who have within the past five years, publicly advocated the violent overthrow of the Federal Government."[2] The Daniel Amendment makes no

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[2] The Daniel Amendment was part of Pub. L. No. 97-92, enacted on December 15, 1981. 95 Stat. 1183. Section 101(a)(3) of the Pub. L. No. 97-92, 95 Stat. 1183, provided that "when an Act listed in this subsection has been reported to a House but not passed by that House as of December 15, 1981, it shall be deemed as having been passed by that House * * *." The Department of Labor's Fiscal 1982 Appropriations Act was listed in Subsection 101(a). On October 6, 1981, the Daniel Amendment was passed by the House of Representatives as part of the Department of Labor's Fiscal 1982 Appropriations Act. H.R. 4560. 97th Cong., 1st Sess. § 514 (1981); 127 Cong. Rec. H7089, H7097 (daily ed., Oct. 6, 1981). The Senate Committee on Appropriations reported to the Senate a provision identical to the Daniel Amendment on November 9, 1981. S. Rep. No. 97-268, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. S13145 (daily ed., Nov. 9, 1981). Thus, pursuant to Section 101(a)(3) of Pub. L. No. 97-92, the Daniel Amendment was "deemed as having been passed by [the Senate]." Since the Daniel Amendment was part of the Department of Labor's Fiscal 1982 Appropriations Act incorporated in Pub. L. No. 97-92, and was passed by the House and deemed passed by the Senate, it became law when Pub. L. No. 97-92 was signed by the President.

The Daniel Amendment would have expired on March 31, 1982 (see Pub. L. No. 97-92, Section 102, 95 Stat. 1193), but on that date Congress passed Pub. L. No. 97-161, 96 Stat. 22, extending the Act of which the Daniel Amendment was a part. The Amendment would again have expired on September 30, 1982, but on October 1, 1982, Congress passed a statute that continued it in effect. Pub. L. No. 97-276.

reference to a provision in CETA itself specifying that "[n]o person * * * shall on the ground of * * * political affiliation or belief be excluded from participation in, be denied the benefits of, [or] be subjected to discrimination under * * * any program or activity funded" under the Act (29 U.S.C. (Supp. IV) 834(a)).

From May 1980 to May 1981, appellee participated in a CETA job training program sponsored by the Virginia Employment Commission (VEC). In May 1981, after completing 600 of the required 700 hours of study, appellee obtained a leave of absence from the training program (App. A, *infra*, 2a).

In January 1982, after passage of the Daniel Amendment, appellee sought to be readmitted to the VEC program (App. A, *infra*, 3a). Acting without instructions from the Secretary of Labor, the VEC required appellee and other applicants to answer the question: "Do you now, or have you within the past five years, publicly advocated the violent overthrow of the Federal Government?" (*ibid.*). The VEC specified that an applicant who answered this question in the affirmative or refused to answer would be disqualified from participating in the program (*id.* at 3a-4a). Appellee declined to answer the VEC question (*id.* at 4a).

3. Without invoking any of the CETA grievance procedures, and before the VEC had acted on her application, appellee brought this suit against the Secretary of Labor in the United States District Court for the District of Columbia. She sought a declaration that the Daniel Amendment is unconstitutional and an injunction requiring the Secretary to direct the VEC to process her application without regard to her political views (App. A, *infra*, 4a). The Secretary, in papers filed in the district court, stated that as he interpreted the Daniel Amendment, "the only type of advocacy which would result in a determination of ineligibility for participation in the CETA program would be advocacy of the use of force or violence to overthrow the government *where such advocacy is directed to inciting or producing*

imminent lawless action and is likely to incite or produce such action." Memorandum of Points and Authorities of the Secretary of Labor at 14; see App. A, *infra*, 8a.

The district court granted appellee's motion for summary judgment. It rejected the Secretary's contention that appellee had to exhaust the grievance process specified in CETA and could not bring this action directly in district court. The district court acknowledged that litigants ordinarily are required to exhaust administrative remedies in order "to prevent premature interference with agency processes, to afford parties and the courts the benefit of agency experience and expertise, to compile an adequate record for judicial review, and to afford an opportunity for the agency to correct its own errors" (App. A, *infra*, 6a). The court declared, however, that it would be "entirely inappropriate" to require appellee to pursue the remedies established by CETA because "the sole question here is the 'purely legal' one of the constitutionality of a congressional enactment" (*id.* at 7a) and the Secretary's "expertise * * * is of doubtful quality in the resolution of a constitutional challenge" (*id.* at 6a). The court added that requiring the exhaustion of administrative remedies also would be inappropriate because (*id.* at 7a):

> The Secretary has failed to provide the VEC with any guidance as to the implementation of [the Daniel A]mendment * * *. As a result, the Virginia officials have merely applied the plain language of the amendment. [Appellee's] action, then, is properly construed as challenging the Secretary's failure to insist that this amendment is implemented in a fashion consistent with the first amendment. The administrative remedies allegedly available to [appellee] apply to disputes between a prime sponsor and a CETA employee, not between an employee and the Secretary.

The district court then concluded that the Daniel Amendment is invalid on its face because it "does not draw a line between mere advocacy and advocacy which incites and is likely to produce violent action" (App. A, *infra*, 8a), while the Constitution protects advocacy that does not amount to incitement (*id.* at 7a-8a). The court recognized that the Secretary's interpretation of the Daniel Amendment drew such a line, and that if the Secretary's construction of the

Daniel Amendment were accepted, the amendment would be consistent with the distinction between protected and unprotected expression established in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (App. A, *infra*, 8a). But the district court ruled, for two reasons, that the Secretary's interpretation was not "a valid and forceful legal exercise" (*id.* at 11a).

First, the court concluded that since the Secretary's interpretation of the Daniel Amendment had not been published for notice and comment under the provisions of the Administrative Procedure Act, 5 U.S.C. 553, that interpretation must be an "interpretative rule" not a "legislative rule" (App. A, *infra*, 9a). Interpretative rules, the court declared, "do not have the same legal significance as legislative rules" and "lack[ ] 'the force of law'" (*ibid.*). The court added that it further discounted "the legal significance of [the Secretary's] interpretation" because "the sole expression of the Secretary's view of the amendment is contained within the pleadings filed in this litigation" (*id.* at 10a).[3]

Second, the district court rejected the Secretary's interpretation because it was inconsistent with the Daniel Amendment. Specifically, the court found "no support" for the Secretary's interpretation in the congressional debates on the Daniel Amendment (App. A, *infra*, 10a). The court also ruled that it would not "take it upon itself to narrow the amendment so as to [make] it free from constitutional defect" (*id.* at 11a).

Finally, the district court strongly suggested that although the Daniel Amendment as interpreted by the Secretary would comply with the *Brandenburg* test, it would nevertheless be unconstitutional (App. A, *infra*, 11a-12a).[4] The court said that the Amendment would still "fail[ ] to provide the procedural safeguards essential in the first amendment area" such as "prompt final administrative or judicial decision" (*id.* at 11a). The court stated, in addition,

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[3] The court noted that this reasoning had not been put forward by appellee (App. A, *infra*, 9a).

[4] The court acknowledged that in this respect, too, it went beyond the arguments made by appellee (App. A, *infra*, 11a n.19).

that it "perceive[d] no rational objective whatsoever which is furthered by" the Daniel Amendment as interpreted by the Secretary (*id.* at 12a).

The district court accordingly declared that the Daniel Amendment "violates the first amendment to the United States Constitution" and ordered the Secretary to "[e]nsure that [appellee's] application for employment training under the CETA is processed without regard to her political affiliations or beliefs" (App. B, *infra*, 13a).

THE QUESTION IS SUBSTANTIAL

This case is now moot. Appellee has completed the CETA training program to which she sought admission; she therefore has obtained all the relief she requested. No exception to the mootness doctrine is applicable here.

If the Court concludes that the case is not moot, it should note probable jurisdiction because the district court has unnecessarily and erroneously invalidated an Act of Congress. The district court erred, first, in invalidating the Daniel Amendment even though a limiting and undoubtedly constitutional interpretation of the Amendment was available. That interpretation is urged by the Secretary, is strongly suggested by the overall structure of the Act, and is consistent with both the legislative history of the Daniel Amendment and this Court's decisions interpreting similar statutes.

Second, the court gave no adequate reason for excusing appellee from the requirement that she exhaust the administrative remedies prescribed by CETA. Those remedies could have provided appellee complete relief. The administrative proceedings also would have afforded the Secretary an opportunity to apply the Daniel Amendment, as he interpreted it, to the facts of appellee's case. Thus, a constitutional issue might never have arisen, and any issue that did arise would not have been in the abstract form of the issue resolved by the district court.

1. This case is now moot. We are advised by the Secretary that appellee was readmitted to the CETA program pursuant to the order of the district court and, in June

1982, completed her training.[5] Appellee has, therefore, "obtained all the relief that [she] sought. In these circumstances, no live controversy remains" (*Lane* v. *Williams*, No. 80-1240 (Mar. 23, 1982), slip op. 9). This is not a class action, and we have no reason to believe that appellee intends to reapply to another CETA program. See *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).

The mootness of this case follows a fortiori from *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). In *DeFunis*, the petitioner challenged a law school admissions policy, prevailed in the trial court, and was accordingly admitted to the law school. By the time the case was submitted to this Court, the petitioner was in his final term of law school. The respondent law school officials represented that even if they prevailed in this Court, they would not alter the petitioner's status. *Id.* at 314-317. The Court concluded that "[b]ecause the petitioner will complete his law school studies * * * regardless of any decision this Court might reach on the merits of this litigation," the case was moot and under Article III, the Court lacked jurisdiction to decide it. 416 U.S. at 319-320.

The dissent in *DeFunis* urged that the case was not moot because "[m]any weeks of the school term remain, and * * * [a]ny number of unexpected events—illness, economic necessity, even academic failure—might prevent [petitioner's] graduation at the end of the term" (416 U.S. at 348). If the petitioner failed to complete his studies, the dissent pointed out, he would again be subject to the admissions policy he challenged. *Id.* at 348-349. The dissent also noted that the court's finding of mootness rested in part on the respondents' voluntary assurances (*id.* at 399).

This case lacks even those features that led the dissent to question whether *DeFunis* was moot. There is no possibility that appellee will not complete the CETA program to which she sought admission; she has already completed it.

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[5] In an affidavit filed in the district court in support of an application for attorney's fees, appellee's counsel stated that appellee had informed him "that she completed the [CETA] brick masonry program on June 11, 1982." Affidavit of Mark Lynch in Support of Motion For an Award of Attorney's Fees, Expenses, and Costs ¶ 15.

Moreover, the mootness of this case does not rest on any assurances given by the Secretary, who has not changed his position or announced a new policy throughout the litigation. This case therefore is not governed by the rule that a defendant who attempts to show mootness after having voluntarily ceased the challenged conduct bears a "heavy burden of persuasion" (*United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 203 (1968), citing *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).[6]

Because the resolution of this case "cannot affect the rights of [the] litigants" (*North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)), the judgment of the district court should be vacated and the case remanded with instructions to dismiss the complaint as moot. See, *e.g.*, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

2. a. If the Daniel Amendment were interpreted in the way specified by the Secretary, it would be constitutional. Congress may not punish the advocacy of abstract doctrine calling for the violent overthrow of the government (*Yates* v. *United States*, 354 U.S. 298, 318-327 (1957)), but under *Brandenburg* v. *Ohio*, *supra*, it may punish "advocacy * * * directed to inciting or producing imminent lawless action and * * * likely to incite or produce such action" (395 U.S. at 447). See, *e.g.*, *Communist Party* v. *Whitcomb*, 414 U.S. 441 (1974); *Healy* v. *James*, 408 U.S. 169 (1972). The Secretary's interpretation follows the *Brandenburg* test.[7]

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[6] In addition, this is not a case in which the defendant is merely "compl[ying] with a court order *pendente lite*" and can again damage the plaintiff if the order is vacated as moot. *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, 545 (1973) (Marshall, J., dissenting); see, *e.g.*, *Bakery Sales Drivers Local No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948).

[7] The district court was plainly incorrect in suggesting that the Amendment might be unconstitutional even as interpreted by the Secretary. Congress may punish as a crime the speech left unprotected by *Brandenburg*; deterring such activity is a sufficient rational basis for the Daniel Amendment. The "procedural safeguards" of which the court spoke (App. A, *infra*, 11a, citing *Freedman* v. *Maryland*, 380 U.S. 51 (1965)) apply to the "administration of a censorship system" (*id.* at 57), not to the imposition of an after-the-fact sanction on unprotected speech (*id.* at 57-58).

The district court declared, however, that the Daniel Amendment could not be construed, by either the Secretary or the court, to apply only to unprotected speech; such a construction, in the court's view, would not be consistent with Congress's intent (App. A, *infra*, 10a-11a). Since the court believed that the amendment prohibited protected speech, it invalidated the amendment on its face, without considering whether appellee would have been barred from CETA programs under the Secretary's interpretation. The court was in error for several reasons.

The Daniel Amendment uses the term "advocate." In an earlier case involving the construction of a statute limiting expression, this Court interpreted the term "advocate" to conform to constitutional requirements, reasoning that "we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the word[ ] 'advocate' * * * in [its] ordinary dictionary meaning[ ] when [it] ha[d] already been construed as [a] term[ ] of art carrying a special and limited connotation." *Yates* v. *United States*, *supra*, 354 U.S. at 319. See also *Dennis* v. *United States*, 341 U.S. 494, 499-502 (1951) (plurality opinion); *Scales* v. *United States*, 367 U.S. 203, 221-222, 228-230 (1961). The district court maintained that the legislative history of the Daniel Amendment shows that Congress intended to disregard the limited meaning traditionally given the term "advocate" and to reach protected expression (App. A, *infra*, 10a-11a & n.17); in fact, the meager legislative history of the Daniel Amendment—which was a floor amendment to an appropriations measure and was not considered by a committee—shows that a Senator who introduced the amendment, in explaining the advocacy it covered, specifically referred to "a series of court decisions which pretty well characterize those remarks which would be considered advocating the violent overthrow of the U.S. Government." 126 Cong. Rec. S16742 (daily ed., Dec. 16, 1980) (remarks of Sen. Warner).

Moreover, as we have noted, CETA contains an explicit prohibition against discrimination on the basis of "political affiliation or belief" (29 U.S.C. (Supp. IV) 834(a)). The Daniel Amendment did not expressly repeal that prohibi-

tion. Repeals by implication are not favored (see, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)), particularly "when the provision advanced as the repealing measure was enacted in an appropriations bill" (*United States* v. *Will*, 449 U.S. 200, 222 (1980)). This "long-established canon of construction carries special weight when an implied repeal or amendment might raise constitutional questions" (*St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 788 (1981)). Since some advocacy is implicit in affiliation, and is almost always an incident of political belief, the most reasonable interpretation of the Act as a whole (see *Richards* v. *United States*, 369 U.S. 1, 11 (1962)) is that only those who engage in unprotected incitement, not those who merely advocate their political beliefs, may be barred from the CETA program.

This Court has recently emphasized that "[w]hen a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems" (*New York* v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 22 n.24). The Court will not reject a construction that saves a statute from unconstitutionality merely because another construction is arguably more consistent with Congress's intentions; "an Act of Congress ought not be construed to violate the Constitution if any other *possible* construction remains available" (*NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (emphasis added)). Here such a construction not only was suggested by the conventional indicia of legislative intent but was specifically urged by the Secretary of Labor, the official who is responsible for administering CETA and whose view is therefore entitled to deference (see, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979) ("Such deference is particularly appropriate where * * * an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of

its statutory objectives.")). See also *Broadrick* v. *Oklahoma*, 413 U.S. 601, 617-618 (1973); *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154, 162-163 (1971).[8]

Finally, even if Congress unquestionably intended the Daniel Amendment to apply to those who engaged in protected speech, the district court erred in simply striking the statute down on its face and ordering relief. "[I]f [a] federal statute is not subject to a narrowing construction * * * it nevertheless should not be stricken down on its face; if severable only the unconstitutional portion is to be invalidated." *New York* v. *Ferber*, *supra*, slip op. 22 n.24. See, *e.g.*, *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 367-375 (1971); *id.* at 375 n.3 (plurality opinion). See also *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy."). Specifically, the invalid applications of a statute are to be severed, and the valid applications left standing, "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not'" (*Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932)). Only "in th[e] rarest of cases [can]

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[8] The district court discounted the Secretary's construction because it was not promulgated under the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553 (App. A, *infra*, 9a). The APA, however, does not require an agency to issue every interpretation of a statute it is enforcing as a rule subject to Section 553. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766, 772 (1969). See also *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200-203 (1947). Moreover, in establishing an adjudicatory grievance mechanism in CETA, Congress plainly envisioned that the Secretary would determine the proper construction of many provisions in the course of deciding particular cases.

It is particularly ironic that the district court criticized the Secretary for stating his interpretation of the Daniel Amendment only in "the pleadings filed in this litigation" (App. A, *infra*, 10a); by not requiring the exhaustion of administrative remedies, the court ensured that the Secretary would first be confronted with the specific facts of appellee's case, and the need to construe the Daniel Amendment, only in this litigation. See pages 13–15, *infra*.

this Court * * * justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application." *United States* v. *Raines*, 362 U.S. 17, 23 (1960). If, as the district court supposed, Congress intended the Daniel Amendment to bar even advocates of abstract ideas from CETA programs, then plainly Congress, had it recognized that this objective was not within its power, would have barred those who engage in unprotected incitement.

b. In light of the Secretary's reasonable interpretation of the Daniel Amendment, the issues resolved by the district court might never have arisen at all—and certainly would not have arisen in such an abstract form—if the district court had not erroneously excused appellee from the requirement that she exhaust the remedies specified in CETA. "The doctrine of exhaustion of administrative remedies is well established * * *. [It] provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969), quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

A claimant need not, of course, exhaust remedies that are plainly inadequate to provide the relief he seeks. See, *e.g.*,*Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 773-774 (1947). But the district court did not conclude, and could not have concluded, that the CETA procedures were inadequate to provide appellee the relief she sought—admission to the VEC program. Had appellee pursued a grievance against the VEC, the Secretary might well have concluded that the Daniel Amendment, as he interpreted it, did not bar her admission; if she were otherwise eligible, he would then have ordered the VEC to admit her. But the Secretary never had the opportunity to make this

determination. Indeed, it remains unclear today whether appellee falls within the Daniel Admendment as interpreted by the Secretary.[9]

The district court did not deny that an applicant who, like appellee, believes a prime sponsor has wrongfully excluded him from a CETA program generally must exhaust the grievance and review procedure specified in the Act. The court asserted, however, that appellee was not required to exhaust the statutory remedies because "the sole question here is the 'purely legal' one of the constitutionality of a congressional enactment" (App. A, *infra*, 7a), and the Secretary had no particular expertise in dealing with such a question. This is incorrect; as the remainder of the district court's opinion shows, the principal issue in this case is the interpretation of the Daniel Amendment. The processes appellee failed to invoke would have provided a particularly appropriate forum in which to resolve this issue. Since the Secretary was "charged with [the] execution" of the Daniel Amendment (*Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)), Congress must have intended that he be allowed the first opportunity to interpret it and that his interpretation be given deference.

In addition, as we have noted, CETA contains a provision strictly forbidding discrimination on the basis of political affiliation or belief. See page 4, *supra*. The provisions of CETA establishing the grievance procedure specifically require the Secretary promptly to take "such corrective measures, as necessary," to remedy any violation of this prohibition by a prime sponsor. 29 U.S.C. (Supp. IV) 816(f).[10] Because the Daniel Amendment makes no explicit reference to this prohibition, the Secretary's resolution of appellee's claim would have involved (and his

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[9] For example, the description of appellee's views given by the district court (App. A, *infra*, 4a) would not by itself be sufficient to bar her from a CETA program, under the Secretary's interpretation.

[10] The Act also provides that the Secretary "shall * * * terminate financial assistance" to any prime sponsor who engages in a pattern or practice of "exclud[ing] any person from participation in" or "subject[ing any person] to discrimination under" a CETA program "on the ground of * * * political affiliation or belief" (29 U.S.C. (Supp. IV) 816(c)(1) and 834(a)).

interpretation of the Daniel Amendment reflects; see pages 10–11, *supra*) an effort to reconcile the Daniel Amendment with the prohibition against political discrimination. This exercise in statutory construction is peculiarly within the Secretary's "discretion * * * [and] expertise" (*McKart* v. *United States*, *supra*, 395 U.S. at 194). The district court therefore had no basis for exempting appellee from the traditional rule requiring the exhaustion of administrative remedies.[11]

By not requiring appellee to invoke the statutory remedies, the district court in effect created a constitutional controversy between appellee and the Secretary where none truly existed. At the time appellee sued the Secretary, the Secretary had neither taken nor threatened to take any action against appellee. Only the VEC had taken an action, and it is undisputed that the Secretary was not involved in that action. The district court observed that "[t]he administrative remedies allegedly available to [appellee] apply to [a] dispute[ ] between a prime sponsor and a CETA employee, not between an employee and the Secretary" (App. A, *infra*, 7a); but at the time of the suit, appellee's only dispute was with the VEC, and as far as appellee knew the Secretary might have agreed with her that the VEC should not have excluded her from the program.

Moreover, if appellee had pursued her statutory remedies and the Secretary had rejected her complaint, judicial review proceedings would have focused on the question whether the Daniel Amendment *as interpreted and applied by the Secretary* is unconstitutional. The court reviewing the Secretary's determination would have had no occasion to consider the question that the district court decided—

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[11] The district court's other reason for not requiring appellee to exhaust the statutory remedies is in fact a reason to require exhaustion. The court characterized appellee's contention as a claim that the Secretary unlawfully "fail[ed] to insist that [the Daniel A]mendment [be] implemented in a fashion consistent with the first amendment" (App. A, *infra*, 7a). The statutory grievance procedure is designed precisely to give applicants a way to have the Secretary "insist" on certain actions by prime sponsors.

the constitutionality of the Daniel Amendment as broadly interpreted. See *Ashwander* v. *TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

CONCLUSION

The judgment of the district court should be vacated and the case remanded with instructions to dismiss the complaint as moot. If the Court determines that the case is not moot, probable jurisdiction should be noted.

Respectfully submitted.

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OCTOBER 1982

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-706

[Filed May 14, 1982]

DOROTHY BLITZ, PLAINTIFF

v.

RAYMOND J. DONOVAN, DEFENDANT

MEMORANDUM OPINION

BARRINGTON D. PARKER, District Judge:

This proceeding summons the application of a well-settled principle of constitutional law: when government decides to provide a benefit or an opportunity, it cannot condition the grant on the surrender of unrelated freedoms. In *Perry* v. *Sindermann*,[1] Justice Stewart, who authored the view of the Supreme Court, stated the principle forcefully:

> [The government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.[2]

The plaintiff Mrs. Dorothy Blitz alleges in her complaint that a recent congressional enactment and its implementation by the Secretary of Labor ran afoul of the principle set

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[1] 408 U.S. 593, 597 (1972). In *Perry*, a state college's Board of Regents refused to rehire a professor who had been outspokenly critical of the Board's policies. The professor alleged that the nonrenewal of his contract violated his free speech rights. The Court held that the allegation presented a "bona fide constitutional claim." *Id.* at 598.

[2] *Id.* at 597.

forth in *Perry* and infringed upon her first amendment right of free speech. This Court agrees with her contentions and concludes that she is entitled to appropriate relief.

BACKGROUND

The series of events supporting the plaintiff's claim are not disputed in any material respect. Mrs. Blitz is a member of the Communist Workers Party. In May 1980, she enrolled in an employment training program established under the Comprehensive Employment Training Act (CETA).[3] She resided in Martinsville, Virginia and the program was administered by the Virginia Employment Commission (VEC).[4] One year later, she had completed 600 of the required 700 hours in her course of study. At that time she obtained a leave of absence because of a pregnancy and anticipated childbirth.

In December 1981, the United States Congress enacted into law an amendment to an appropriations bill for fiscal year 1982. The enactment, Public Law 97-92,[5] provided that:

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[3] 29 U.S.C. § 801 *et seq.* (1982 Supp.).

[4] The state or local government units, called "prime sponsors" under the Act, are responsible for carrying out CETA programs in their communities. 29 U.S.C. § 811(a); 20 C.F.R. §§ 676.2, 676.5 (1980).

[5] Public Law 97-92 was a continuing resolution appropriating funds at specified levels for federal government programs that had not previously been funded by separate appropriations bills. On October 6, 1981, the House of Representatives passed the challenged provision, Section 514, H.R. 4560, 95th Cong., 1st Sess. (1981). 127 Cong. Rec. H7089, H7097 (daily ed. October 6, 1981). The Senate Committee on Appropriations reported to the Senate the same substantive provision on November 9, 1981, S.Rep. No. 97-268, 97th Cong., 1st Sess. (1981). 127 Cong. Rec. S13145 (daily ed. Nov. 9, 1981). Under section 101(a)(3) of Pub.L. 97-92, when a provision "has been reported to a House but not passed by that House as of December 15, 1981, it shall be deemed as having been passed by that House. ..." Thus, the amendment was effective during the period of the continuing resolution, which expired March 31, 1982. The government stated at oral argument that on March 31, 1982, Congress extended the continuing resolution, including the challenged amendment, through September 30, 1982.

> None of the funds appropriated or otherwise made available by this Act may be used, pursuant to the Comprehensive Employment Training Act, for the participation of individuals who publicly advocate the violent overthrow of the Federal Government, or who have within the past five years, publicly advocated the violent overthrow of the Federal Government.

The legislative history of the amendment left no doubt that it was specifically intended to exclude Mrs. Blitz from the CETA program because of her political beliefs and affiliations and because she expressed those beliefs in her community.[6] The enactment has since been referred to as the "Blitz Amendment."

On January 20, 1982, after the birth of her child, Mrs. Blitz reapplied to the Martinsville, Virginia CETA officials with the hope of completing her course of study. Although she was found eligible and qualified to pursue her training, she was told by a VEC representative that the "Blitz Amendment" presented problems as to her enrollment. The representative also informed the plaintiff that the VEC office was awaiting guidance from the Virginia Attorney General on the implementation of this amendment and could not enroll her until such guidance was received.

On January 24, 1982, Mrs. Blitz wrote the Virginia Attorney General requesting a prompt decision on whether she could participate in the program. She was advised on February 15 that the question of her eligibility was still under review. The response also noted that "[t]he Labor Department has declined to prepare field instructions, which has left the various states very much on their own in implementing the amendment."[7]

In late February 1982, the VEC issued a regulation requiring all CETA applicants to respond with a "yes" or "no" answer to the question: "Do you now, or have you within the past five years, publicly advocated the violent overthrow of the Federal Government?" The regulation provid-

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[6] 126 Cong.Rec. H10572 (daily ed., Nov. 13, 1980); 126 Cong.Rec. S16192 (daily ed., Dec. 11, 1980); 126 Cong.Rec. H12386 (daily ed., Dec. 12, 1980); 126 Cong.Rec. S16742-43 (daily ed., Dec. 15, 1980).

[7] Exhibit A, Second Blitz Affidavit (March 23, 1982).

ed that if the applicant supplied a "yes" answer or refused to answer he would be disqualified from eligibility and participation in the CETA program. It further provided that if the applicant gave an equivocal answer, the matter was to be reported to the Central Office of the Virginia Employment Commission, and the applicant would remain disqualified until that office made a further determination.

Mrs. Blitz refused to answer the question, stating that she had a right to participate in CETA programs "no matter what" her political beliefs and associations. According to her affidavit, she believes:

> that the United States government will one day be overthrown in a popular, domestic revolution because the government does not serve the interests of the American people. I also believe that only the American people will be able to overthrow the government and that they will do so when it becomes evident that it is in their best interests to do so. I believe that this revolution may have to be accomplished by force if necessary, and that the American people have an inalienable right to such a revolution as a defense to governmental oppression.

The plaintiff also stated in her affidavit that she does "not advocate and [has] never advocated, violent revolution at the present time because the majority of Americans do not yet understand that revolution, violent or otherwise, is in their best interests."[8]

Because she could not, under the state regulation, resume her CETA training, Mrs. Blitz sought an injunction ordering the Secretary of Labor to direct the VEC to process her application to the CETA program without reference to her political affiliations or beliefs. She also requested a judgment declaring that the amendment infringes her right of free speech in violation of the first amendment and is a penalty directed specifically at her, thereby violating the Bill of Attainder Clause.[9]

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[8] Blitz Affidavit ¶¶ 11, 14 (March 10, 1982).

[9] U.S. Const. Art. I, § 9.

The parties agree that the issues presented here may be resolved on cross-motions for summary judgment. The Court has considered the memoranda of points and authorities and the argument of counsel and concludes that the congressional enactment violates basic first amendment principles. Mrs. Blitz should be awarded summary judgment. The reasons to support that determination are presented in the following analysis.

LEGAL ANALYSIS

In response to Mrs. Blitz's complaint, the Secretary of Labor advances a two-pronged argument: first, that this Court lacks jurisdiction because she failed to exhaust the administrative remedies provided by the CETA; second, that the "Blitz Amendment," as interpreted by the Secretary, is constitutional.

A.

Jurisdiction. The defendant argues that specific provisions for administrative and judicial review under the CETA preclude jurisdiction over this action in district court. Under the Act, a prime sponsor such as the VEC must establish and maintain "a grievance procedure, including provisions for hearings within 30 days after the filing of a grievance, and for handling complaints about the program arising from its participants, subgrantees, contractors, and other interested persons." 29 U.S.C. § 816(a)(1). After exhausting the grievance system, an interested person or organization may submit a complaint to the Secretary of Labor who must investigate, hold a hearing if necessary, and render a final decision on the matter. *Id.* at § 816(b). The plaintiff, it is argued, failed to pursue her administrative remedies; had she done so, the court of appeals, not the district court, would have had jurisdiction to review the administrative decision. *Id.* at § 817(a).

The long-settled rationale for the doctrine of exhaustion is that the administrative agency must be afforded an opportunity to correct its alleged wrongful action. The reasons for the doctrine as outlined by the Supreme Court in

Weinberger v. *Salfi*, 422 U.S. 749, 765 (1975), are to prevent premature interference with agency processes, to afford parties and the courts the benefit of agency experience and expertise, to compile an adequate record for judicial review, and to afford an opportunity for the agency to correct its own errors. While these are strong policy reasons for the exhaustion requirement, those reasons must be examined and reviewed in light of the circumstances presented in a given situation. *McKart* v. *United States*, 395 U.S. 185, 193 (1969); *Association of National Advertisers, Inc.* v. *FTC*, 627 F.2d 1151, 1156 (D.C.Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

In this proceeding, application of the doctrine would be entirely inappropriate. The expertise of the Department of Labor in the administration of the CETA program is of doubtful quality in the resolution of a constitutional challenge where issues are concerned solely with the sensitive area of the speech clause of the first amendment. Indeed, it has been noted that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Oestereich* v. *Selective Service Local Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring). *See also*, *Weinberger* v. *Salfi*, 422 U.S. at 765; *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (1958). And our own Court of Appeals has recognized that a party may "bypass established avenues for review within the agency ... where the agency has very clearly violated an important constitutional or statutory right." *Fitzgerald* v. *Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

The Act itself does not require an administrative determination of constitutional claims. Indeed, a similar exhaustion argument was rejected by the Second Circuit in *Hark* v. *Dragon*, 611 F.2d 11 (2d Cir. 1973), when a CETA worker brought an action claiming that a state's durational employment policies deprived him and others similarly situated of their constitutional rights to equal protection and due process. Because the constitutional concerns were "sharply defined" and "purely legal," the exhaustion claim was quickly rejected. *Id.* at 14. *See also*, *CETA Workers' Orga-*

nizing Committee v. *City of New York*, 617 F.2d 926, 934 n.6 (2d Cir. 1980). Similarly, the sole question here is the "purely legal" one of the constitutionality of a congressional enactment.

The Secretary nonetheless claims that, as will be seen below, he has interpreted the amendment in such a way as to insure its constitutionality, and thus the plaintiff's dispute—if one remains at all—is solely with the VEC. This Court discounts the legal significance of the Secretary's interpretation and remains concerned with the constitutional question. But even if the Secretary's position were correct, administrative exhaustion would still not be required. The Secretary has failed to provide the VEC with any guidance as to the implementation of this amendment, even though he is required to ensure that CETA programs are carried out in compliance with the Act. 29 U.S.C. § 814(c)(1). As a result, the Virginia officials have merely applied the plain language of the amendment. Mrs. Blitz's action, then, is properly construed as challenging the Secretary's failure to insist that this amendment is implemented in a fashion consistent with the first amendment. The administrative remedies allegedly available to the plaintiff apply to disputes between a prime sponsor and a CETA employee, not between an employee and the Secretary. *See* 29 U.S.C. § 816(b). Thus, a suit in federal district court is not jurisdictionally defective.

B.

The Constitutional Issues. Perhaps the most telling indictment of the constitutionality of the amendment is reflected in the position adopted by the Secretary. He does not contend that a plain reading of the amendment could possibly withstand constitutional scrutiny. The reason is simple. The first amendment clearly bars the government from penalizing mere advocacy of any idea, including violent revolution. The Supreme Court in *Brandenburg* v. *Ohio* unanimously agreed that:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except

> where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. 444, 447 (1969). *See also, Healy* v. *James*, 408 U.S. 169, 188 (1972)—"the critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'"[10] The "Blitz Amendment" does not draw a line between mere advocacy and advocacy which incites and is likely to produce violent action and cannot, therefore, withstand the *Brandenburg* test.

Confronted with the facial invalidity of the enactment, the government contends that Congress must have intended to exclude from the CETA program only those applicants whose speech falls outside of the first amendment parameters established in *Brandenburg*.[11] It suggests that the term "advocate" has taken on a specialized meaning in the context of federal legislation.[12] The Secretary of Labor interprets the amendment as barring from participation in CETA only those persons who advocate the use of force or violence to overthrow the government "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[13] In other words, the Secretary has rewritten the amendment in order to conform to the *Brandenburg* test.

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[10] This principle has been explicitly held applicable to regulatory schemes that determine eligibility for public employment. *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 448 (1974) (cases cited therein).

[11] The government makes no claim that individuals who advocate the violent overthrow of the government are excluded from CETA employment on that ground that such persons interfere with the mission of the agency. *Cf., U.S. Civil Service Commission* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

[12] *See* pages 10a-11a *infra*, note 17.

[13] Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction and in Support of Defendant's Motion to Dismiss at 14.

A number of problems beset the Secretary's position, none of which, unfortunately, are fully explored in the parties' pleadings. We first note that the Secretary's interpretation of the "Blitz Amendment" does not conclusively settle the constitutional question. The Administrative Procedure Act (APA), requires advance publication and opportunity for public participation for all rules except "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. §§ 551, 553(d)(2).[14] No such notice and comment was provided in this case, and thus the Secretary's assessment of the amendment is best characterized as an "interpretative rule." Indeed, at oral argument, government counsel suggested that the Secretary's statements concerning the amendment might properly be so characterized.[15] The Court agrees, finding that no other exceptions to the APA's notice and comment requirements are applicable here.

Interpretative rules, however, do not have the same legal significance as legislative rules. As Judge Bazelon stated in *Batterton* v. *Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980):

> Such actions or statements are not determinative of issues or rights addressed. They express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities. They do not, however, foreclose alternative courses of action or conclusively affect rights of private parties. . . . Unlike legislative rules, non-binding agency statements carry no more weight on judicial review than their inherent persuasiveness commands.

The Secretary's revision of the amendment, then, lacks "the force of law." *Id.* at 701. There is no requirement, as matters now stand, that the VEC apply the Secretary's

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[14] The required notice and comment may also be avoided "for good cause found and published within the rule", 5 U.S.C. § 553(d)(3), and for "a substantive rule which grants an exception or relieves a restriction." 5 U.S.C. § 553(d)(1). Neither of these provisions could apply here.

[15] Transcript of Hearing (April 1, 1982) at 8.

interpretation or even that the Secretary adhere to the interpretation set forth in the pleadings. Moreover, the sole expression of the Secretary's view of the amendment is contained within the pleadings filed in this litigation. The failure of the Secretary to provide so much as an affidavit on this issue diminishes, in this Court's view, the legal significance of his interpretation still further. The proper focus for judicial review, then, is upon the amendment itself, and as already noted, that enactment is clearly unconstitutional.

Second, even if the Secretary's interpretation were of greater legal significance than the APA dictates, the congressional debate on the amendment cannot be reconciled with the Secretary's interpretation. The legislative history affords no support to the Secretary's interpretation. The legislation was introduced in the House by Congressman Dan Daniel, the representative from Mrs. Blitz's district.[16] He urged its passage stating: "I do not believe it was the intention of Congress that individuals whose stated policy is the overthrow of our system be the beneficiary of that system." 126 Cong. Rec. H1052 (daily ed., Nov. 13, 1980). Similarly, Senator Hollings, who introduced and argued for the amendment in the Senate, urged that "we want to make absolutely certain that training program moneys are not used to train and employ those who would advocate the violent overthrow of the U.S. Government." 126 Cong. Rec. S16192 (daily ed., Dec. 11, 1980). No congressman suggested the limitation now proposed by the Secretary. The Secretary's interpretation is simply woven from whole cloth, without any basis in the statutory history.[17]

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[16] The plaintiff's Bill of Attainder Clause argument is based on the repeated statements of Congressman Daniel and other legislators of the need to bar persons such as Mrs. Blitz from the CETA program. *See supra*, n.6. This Court need not address this argument because of the finding that the amendment violates the first amendment.

[17] The absence of any support for the Secretary's interpretation distinguishes this case from that relied upon by the Secretary, *Yates* v. *United States*, 354 U.S. 298 (1957). There, the Court interpreted the Smith Act as drawing a line between protected advocacy of doctrine and unprotected advocacy of action. However, the basis for that distinction was the finding that "the legislative history of the Smith Act

It is an unquestioned rule of law that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977). The Secretary's interpretation is not consistent with the statute. Nor can this Court take it upon itself to narrow the amendment so as to render it free from constitutional defect. *See Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964). To limit the amendment as the Secretary suggests "would be to make a new law, not to enforce an old one. This is no part of our duty." *United States* v. *Reese*, 92 U.S. 214, 221 (1876).[18]

Finally, even if the Secretary's interpretation were a valid and forceful legal exercise, an array of constitutional problems would remain.[19] The Secretary's revision totally fails to provide the procedural safeguards essential in the first amendment area. For instance, the review procedure must assure prompt final administrative or judicial decision to minimize the deterrent effect of an erroneous denial of a job, *Freedman* v. *State of Maryland*, 380 U.S. 51, 58 (1965), and the burden of providing that the applicant participated in unprotected expression must rest on the government, *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). In addition, the Secretary's approach erroneously assumes that satisfaction of the *Bradenburg* test eliminates a further inquiry into the constitutionality of excluding government benefits on the basis of unprotected speech. While the

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and related bills shows beyond all question that Congress was aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action, and that it did not intend to disregard it." *Id.* at 319. Indeed, the congressional debates included explicit references to Supreme Court cases which construed the term "advocacy." *Id.* No such legislative history exists in this case.

[18] *See also, Scales* v. *United States*, 367 U.S. 203, 211 (1961) ("[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not ... carry this to the point of perverting the purpose of a statute").

[19] These issues were not raised in the plaintiff's pleadings. However, in light of the importance of the principles of constitutional law raised by this case, this Court feels compelled to demonstrate, even in a rather preliminary fashion, how the Secretary's position in this case conflicts with constitutional dogma.

government may, under *Brandenburg*, prohibit certain types of advocacy, a separate constitutional question is raised as to whether that unprotected advocacy can supply the basis for denial of a government benefit. *Cf.*, *Pickering* v. *Board of Education*, 391 U.S. 563, 574 n.6 (1968). At the very least, fifth amendment considerations require a showing that the denial of a benefit to a certain class of individuals is reasonable and in furtherance of a valid governmental purpose. *See e.g.*, *Morey* v. *Doud*, 354 U.S. 457, 463-464 (1957).

The Court perceives no rational objective whatsoever which is furthered by the imposition of this barrier to employment training. The legislative history suggests that the amendment was enacted because Congress did "not want people who are paid by the government to advocate the violent overthrow of our government." 127 Cong. Rec. S16742 (Dec. 15, 1980) (statement of Senator Proxmire). But while CETA workers who advocate the violent overthrow of the government might be ingrates, the Constitution protects them as well as the appreciative.

The admonition of Justice Frankfurter voiced more than 30 years ago is applicable here: "Congress may withhold all sorts of facilities for a better life, but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities." *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950). In enacting the "Blitz Amendment", the Congress violated this basic principle of constitutional law.

The plaintiff is enacted to appropriate relief. An order and judgment consistent with this opinion will be filed.

/S/ BARRINGTON D. PARKER
United States District Judge

Entered: 14th May 1982

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-706

[Filed May 14, 1982]

DOROTHY BLITZ, PLAINTIFF

v.

RAYMOND J. DONOVAN, DEFENDANT

ORDER AND JUDGMENT

In accordance with the accompanying Memorandum Opinion, it is this 14th day of May, 1982

ORDERED that defendant's motion for summary judgment be, and hereby is, denied, and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be, and hereby is, granted.

Judgment is entered for the plaintiff, Dorothy Blitz, and it is

DECLARED that the amendment to Public Law 97-92 which bars the appropriation of moneys pursuant to the Comprehensive Employment and Training Act (CETA) for the participation of individuals who publicly advocate the violent overthrow of the federal government violates the first amendment to the United States Constitution, and it is

FURTHER ORDERED that the Secretary of Labor shall immediately undertake all appropriate steps to insure that the plaintiff's application for employment training under the CETA is processed without regard to her political affiliations or beliefs.

/S/ BARRINGTON D. PARKER
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0796
Received: June 9, 1982

DOROTHY BLITZ, PLAINTIFF,

v.

RAYMOND J. DONOVAN, DEFENDANT.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. §§ 1252 and 2101(a), Raymond J. Donovan, Secretary of Labor, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on the 14th day of May, 1982.

Respectfully submitted,

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Assistant Attorney General
STANLEY S. HARRIS
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/S/ RICHARD K. WILLARD
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No. 82-611

IN THE

Supreme Court of the United States

October Term, 1982

RAYMOND J. DONOVAN,
SECRETARY OF LABOR,

Appellant,

v.

DOROTHY BLITZ,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEE'S MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT

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QUESTIONS PRESENTED

1. Whether the Court should dismiss the appeal, rather than vacate the judgment below, where the case has become moot because appellant complied with the district court's order and did not seek a stay.

2. Whether the district court properly rejected a narrowing construction of the challenged statute which was contrary to the plain language and legislative history of the statute.

3. Whether the district court properly held that appellee was not required to exhaust administrative remedies where the existing remedies were not applicable to the controversy, exhaustion would have been futile, no facts were in dispute, and the sole issue was the constitutionality of the challenged statute.

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RAYMOND J. DONOVAN,
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Appellant,

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Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

APPELLEE'S MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT

Appellee respectfully moves the Court to dismiss the appeal. This case is moot because appellant complied with the district court's injunction and provided appellee with all the relief she sought. Since the case has become moot through appellant's actions rather than through circumstances over which he had no control, the Court should dismiss the appeal rather than vacate the judgment below, as appellant requests. However, if the Court decides to vacate the judgment, it should not order dismissal of the complaint because appellee's application

for attorney's fees is pending before the district court. In the alternative, if the Court concludes that the case is not moot, appellee moves the Court to affirm the judgment of the district court on the ground that it is so clearly correct that it requires no further argument.

STATEMENT

Appellant's statement of the case omits several points which are pertinent to a proper understanding of this case. First, the amendment which provoked this controversy was enacted for the express purpose of excluding appellee from a job training program conducted under the Comprehensive Employment and Training Act of 1973 (CETA). It is because the legislative debate focused exclusively on appellee that the district court referred to the amendment as the "Blitz amendment." Second, appellant's inaction prior to commencement of this suit belies his argument that his narowing construction of the amendment would have made this litigation unnecessary. When the Blitz amendment was first enacted, he failed to answer the request of the Virginia Employment Commission (VEC) for guidance, and later he ignored appellee's request for assistance before she filed suit. Third, when the district court ordered appellant to provide the relief appellee requested, appellant did not seek a stay of the injunction but promptly complied with it. Fourth, there is presently pending in the district court an application for attorney's fees. Fifth, appellee recently has applied to another federally funded job training program.

In May 1980, Mrs. Blitz enrolled in a CETA program conducted by the VEC in Martinsville, Virginia. Appendix to Jurisdictional Statement (hereinafter "App.") at 2a.

Appellee is a member of the Communist Workers Party. (*Id.*) She believes that the United States government will one day be overthrown because in her view it does not serve the interests of the American people. (App. at 4a.) She also believes that only the American people will be able to overthrow the government and that they will do so when it becomes evident that it is in their best interests to do so. (*Id.*) Appellee believes that this revolution may have to be accomplished by force, if necessary, and that the American people have an inalienable right to such a revolution as a defense to governmental oppression. (*Id.*) However, she does not advocate and has never advocated violent revolution at the present time because the majority of Americans do not yet understand that revolution, violent or otherwise, is in their best interests. (*Id.*)

On November 13, 1980, Congressman Dan Daniel of Virginia, in whose congressional district appellee then resided, introduced a bill to amend the Comprehensive Employment and Training Act to bar participation by any person "who publicly advocates the violent overthrow of the United States Government or has so advocated such a course of action within the past five years." H.R. 8339, 96th Cong., 2d Sess. (1980). Congressman Daniel stated that he was introducing this bill because he recently had learned that Mrs. Blitz and her husband were members of the Communist Workers Party and were enrolled in a CETA training program in his district. 126 Cong. Rec. H10572 (daily ed., Nov. 13, 1980). He stated that he did not believe "that it was the intention of Congress that individuals whose stated policy is the overthrow of our system be the beneficiary [sic] of that system." *Id.*

On December 11, 1980, Senator Hollings introduced a variation of Congressman Daniel's bill as an amendment

to a continuing resolution to provide funding for the Department of Labor. 126 Cong. Rec. S16192 (daily ed., Dec. 11, 1980). Senator Hollings stated that he was introducing the amendment at the request of Congressman Daniel and Senator Byrd of Virginia for the specific purpose of excluding appellee from the CETA program. *Id.*[1] In support of the amendment, Senator Hollings cited three fragmentary press clippings from the *Martinsville Bulletin* which identified Mrs. Blitz by name and indicated that she believes in the overthrow of the government and that such a revolution might necessarily be violent. *Id.* The Senate adopted Senator Holling's amendment by unanimous consent. *Id.*

The following day, Congressman Daniel addressed the House to express his satisfaction that the Senate had adopted the Blitz amendment and his hope that the House conferees would accept it. 126 Cong. Rec. H12386 (daily ed., Dec. 12, 1980). At that time, he once again made clear that the amendment was aimed at appellee. *Id.* Although the House conferees initially accepted the Blitz amendment, *see* 126 Cong. Rec. S16742 (daily ed., Dec. 15, 1980), it was not passed in 1980 because all riders to the continuing resolution were ultimately eliminated in order to secure agreement in the closing hours of the 96th Congress. 126 Cong. Rec. S16585 - S16589, H12537 - H12547, S16727 - S16745 (daily ed., Dec. 15, 1980). However, Senator Warner of Virginia made a last-minute effort in the pre-dawn hours of December 16, 1980 to restore the amendment after it had been eliminated by the House and Senate conferees. 126 Cong. Rec. S16742 - S16744 (daily

[1]Congressman Daniel had been unable to introduce such an amendment when the resolution was before the House because the resolution was considered under a procedure which did not permit any amendments. 126 Cong. Rec. H12386 (daily ed., Dec. 12, 1980).

ed., Dec. 15, 1980). Once again, a proponent of the amendment made it absolutely clear that his intention was to exclude Mrs. Blitz from the CETA program. *Id.* at S16742 - S16743. Senator Warner withdrew his amendment only after receiving assurances from the majority and minority leaders of the Senate that the Blitz amendment would be given prompt consideration in the 97th Congress. *Id.* at S16743 - S16744.

On October 6, 1981, Congressman Daniel introduced the Blitz amendment to the 1982 Department of Labor appropriations bill. 127 Cong. Rec. H7089, H7097 (daily ed., Oct. 6, 1981). The House adopted the amendment by voice vote without any debate. *Id.* On November 19, 1981, the Senate Committee on Appropriations reported the 1982 appropriations bill for the Department of Labor, which included the Blitz amendment. H.R. 4560, 97th Cong., 1st Sess. § 514 (1981). Under the terms of Public Law 97-92, 95 Stat. 1183 (Dec. 15, 1981), a continuing resolution providing funds for, *inter alia,* the Department of Labor, the Blitz amendment was enacted into law on December 15, 1981, and has been twice re-enacted through subsequent continuing resolutions. *See* Jurisdictional Statement (hereinafter "J.S.") at 3 n.2.[2]

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[2]There are two legislative developments of which the Court should be aware, although appellee does not believe that they make this case moot. First, the Comprehensive Employment and Training Act expired on September 30, 1982, at the end of the 1982 fiscal year, 29 U.S.C. § 822(a)(1) (Supp IV), and was replaced by the Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322 (Oct. 13, 1982). The most recent continuing resolution extending the Blitz amendment makes funds that were available under CETA available under the Job Training Partnership Act. Pub. L. No. 97-276, § 162, 96 Stat. 1186, 1204 (Oct. 2, 1982). Accordingly, the funds appropriated for the new job training act continue to be restricted by the Blitz amendment.

(cont'd)

In May 1981, before completing her training program, Mrs. Blitz was given a leave of absence because she was pregnant. (App. at 2a.) After her child had been born, appellee re-applied to the CETA program on January 20, 1982, in order to finish the training she had begun. (App. at 3a.) Appellee was informed by an official in the Martinsville office of the VEC that she was eligible for the program but for the uncertainty created by the recently enacted amendment. (*Id.*) She was further informed that the VEC was awaiting guidance from the Virginia Attorney General. (*Id.*) On January 24, 1982, appellee wrote to the Virginia Attorney General asking him to clarify the uncertainty over her eligibility. (*Id.*) On February 15, 1982, an attorney in the office of the Virginia Attorney General informed appellee that the United States Department of Labor had declined to provide guidance to the state and that the state was still considering its position. (*Id.*) Thereafter, on February 18, 1982, the VEC issued a regulation requiring all applicants to state whether they have within the past five years advocated the violent over-

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Thus, we do not understand appellant to argue that this case has become moot by virtue of the expiration of CETA.

Second, the current continuing resolution enacting the Blitz amendment expires on December 17, 1982. Pub. L. No. 97-276, § 102, 96 Stat. at 1190. However, the Job Training Partnership Act has a transitional provision which states that "the Secretary, from funds appropriated pursuant to this Act or pursuant to the Comprehensive Employment and Training Act, shall provide financial assistance under this Act in the same manner that such assistance was provided under the Comprehensive Employment and Training Act (as in effect on the day before the enactment of this Act) until September 30, 1983." Pub. L. No. 97-300, § 181(a), 96 Stat. at 1354. Thus, it appears that even if the current continuing resolution is not extended beyond December 17, 1982, eligibility for programs under the Job Training Partnership Act will continue to be restricted by the Blitz amendment until September 30, 1983, and the case will not be rendered moot by the expiration of Pub. L. 97-276.

throw of the government. (*Id.*) When this regulation was brought to appellee's attention on February 26, 1982, she refused to answer the question. (App. at 4a.)

Before appellee filed suit, her counsel requested the Secretary of Labor to direct the VEC to process appellee's application without regard to her political beliefs. These requests were made orally on February 26, 1982, and in a letter hand-delivered to the Department of Labor on March 4, 1982. (Affidavit of Mark H. Lynch, March 11, 1982.) When these entreaties produced no response, appellee filed suit on March 11, 1982.

Although the Secretary of Labor announced his narrowing construction in his motion to dismiss in the district court, he took no steps to inform the VEC or any other prime sponsor that the Blitz amendment was to be so interpreted. (App. 9a-10a.) However, when the district court ordered the Secretary to undertake appropriate steps to insure that appellee's application was processed without regard to her political affiliations or beliefs, he did not seek a stay of the injunction and complied with it. (Appendix A, *infra*). Consequently, appellee was re-admitted to the training program and completed it in June 1982.

Although the controversy over appellee's participation in the job training program has become moot, ancillary proceedings in the district court are still under way. On June 16, 1982, appellee filed a timely application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (Supp. IV), and the district court has not yet ruled on that application.

Appellee and her family have now moved to New York City. Appellee has informed counsel that she has applied to a federally funded job training program there, and that

she has completed the orientation phase of the application process. She anticipates that she will undergo the assessment phase of the application process in January 1983 and shortly thereafter begin an on-the-job-training program in the same trade she studied in Virginia. Appellee has not encountered any difficulty with this application on account of the Blitz amendment.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED.

The parties are in agreement that the case is moot because appellant complied with the district court's injunction and provided appellee with all the relief she sought. However, the parties are in disagreement over the appropriate disposition of the case. Appellant asks the Court to vacate the judgment of the district court and remand the case with instructions to dismiss the complaint as moot. Appellee submits that the Court should dismiss the appeal.

When an appeal of a lower court decision becomes moot "through happenstance," this Court ordinarily vacates the judgment and remands with a direction to dismiss the complaint. *United States v. Munsingwear,* 340 U.S. 36, 39-40 (1950). However, this procedure is not appropriate when the case becomes moot because of the appellant's actions.

> If the circumstances which rendered the case moot, after the judgment in the trial court, are due to circumstances over which appellant had no control, then the Supreme Court has, in some circumstances, in order to avoid unfairness, reversed and remanded with directions to the trial court to dismiss the suit instead of dismiss-

> ing the appeal. But that is not the invariable practice. And we think that it is not the proper course here. This case has not become moot because of intervening circumstances over which appellant had no control. It resembles one where, after an appeal is taken, the defeated plaintiff settles and compromises the action or executes a release of his right to appeal . . . . [D]ismissal of the suit, as distinguished from dismissal of the appeal, might result in unfairness to appellee by subjecting him to other vexatious actions by appellant.

Cover v. Schwartz, 133 F.2d 541, 546-47 (2d Cir.), *cert. denied*, 319 U.S. 748 (1943) (footnotes omitted). Similarly, in *Ringsby Truck Lines v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982), the court found "the distinction between litigants who are and are not responsible for rendering their case moot at the appellate level persuasive," *id.* at 721, and held that dismissal of the appeal rather than dismissal of the action is the proper procedure when the appellant is responsible for the mootness. *Id.* at 722. *Cf. Mills v. Green*, 159 U.S. 651, 653 (1895).[3]

In this case, appellant made no effort to preserve the status quo by seeking a stay of the district court's injunc-

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[3] *But see New Left Education Project v. Board of Regents of the University of Texas System*, 472 F.2d 218 (5th Cir.), *vacated*, 414 U.S. 807 (1973). In that case, the court of appeals followed the reasoning in *Cover v. Schwartz* and dismissed the appeal without vacating the judgment of the district court. This Court then issued an order vacating the judgment and directing the complaint to be dismissed. Although there was no explanation for that disposition, it may have been influenced by considerations of federalism since the district court's order had the effect of enjoining a state court proceeding over the same subject matter. *See* Petition for a Writ of Certiorari, *Board of Regents v. New Left Education Project*, No. 72-1485.

tion. Instead, he promptly directed the VEC to admit appellee to the training program. (Appendix A, *infra.*) Where a party fails to seek a stay of a district court's order and complies with a mandatory injunction, he sacrifices his right to appeal and cannot expect to reap the benefits of an appeal.[4] Furthermore, if the government's compliance with a mandatory injunction entitled it to have the district court's judgment vacated, such a rule would permit the government to litigate the merits of a case fully and then, having lost, undermine the precedential and preclusive effect of the judgment by compliance as to the plaintiff while continuing to maintain a general posture deemed illegal by the district court. Such a doctrine would be wholly inconsistent with basic conceptions of the rule of law, *see Cooper v. Aaron,* 358 U.S. 1, 18-19 (1958), to say nothing of modern notions of res judicata and collateral estoppel. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).[5]

The practical equities in this case present particularly compelling reasons for dismissing the appeal rather than vacating the district court's judgment. Mrs. Blitz has applied to a job training program in New York City, and the funds for that program are subject to the Blitz amendment. *See* note 2, *supra.* Since appellee has not en-

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[4]*See, e.g., Curtis v. Taylor,* 625 F.2d 645, 648, 653 (5th Cir. 1980); *Matter of Combined Metals Reduction Co.,* 557 F.2d 179, 187-88 (9th Cir. 1977); *Taylor v. United States,* 410 F.2d 392 (5th Cir. 1969); *Bingham v. Yingling Chevrolet Co.,* 297 F.2d 341 (10th Cir. 1961).

[5]The disposition appellant seeks would also encourage plaintiffs in cases such as this to bring class actions as insurance against the strategy appellant has followed here. Litigation over class certification and the separate questions of mootness in class actions would only increase costs to litigants and demands on the courts.

countered any difficulty in New York and her application is not yet completely processed, she is not faced with any ripe controversy under the Blitz amendment.[6] However, if any controversy should arise over her eligibility because of the amendment, the judgment of the district court will be very important to her, and she should not be forced to relitigate this case as a result of appellant's decision to forego his right to appeal.

This is precisely the situation envisioned by the court in *Cover v. Schwartz* when it stated that an appellee might be subjected to "vexatious actions by appellant" if the judgment of the district court were vacated. 133 F.2d at 547. "If the effect of post-judgment settlements were automatically to vacate the trial court's judgment, any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books," *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, supra,* 686 F.2d at 721, and that appears to be appellant's strategy in this litigation. There is no reason "why appellant should be permitted to avoid the collateral estoppel effect of the district court's findings by settling this dispute on appeal and petitioning for vacation of the court's adverse findings." *Id.* at 721 n.1. Instead, whatever preclusive or precedential effect the district court's judgment may or may not have should be left to the court in which any subsequent dispute may be litigated. *Id.* at 722. *See Parklane Hosiery Co. v. Shore, supra,* 439 U.S. at 331.

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[6]Since there is no apparent likelihood that appellee will be barred from the New York program, the Blitz amendment is not causing any continuing impact on appellee which would warrant a finding that this case is not moot. *Compare, e.g., Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115 (1974).

The government in other cases has taken the position that *"Munsingwear* should not be read to require this Court to vacate every judgment that becomes moot pending disposition of a petition for a writ of certiorari." Reply Brief for the Petitioner at 2, *SEC v. Board of Trade of the City of Chicago,* No. 82-526, *cert. granted, judgment vacated* (Nov. 29, 1982). Thus, in two cases where petitioners complied with grand jury subpoenas which the government had successfully enforced, the Court at the government's request denied the petitions for certiorari without vacating the judgments below. *Local 102, International Ladies' Garment Workers' Union v. United States,* 439 U.S. 1070 (1979) (No. 78-633); *Velsicol Chemical Corp. v. United States,* 435 U.S. 942 (1978) (No. 77-900).

In those cases, the government argued that a judgment should be vacated only when the Court would have granted the petition if the case had not become moot. On the other hand, if the Court would not have granted the petition, it should not disturb the judgment below. Brief for the United States in Opposition at 4-8, *Velsicol Chemical Corp. v. United States, supra,* No. 77-900; Memorandum for the United States in Opposition at 4 n.4, *Local 102, International Ladies' Garment Workers' Union v. United States, supra,* No. 78-633. In urging this approach, the Solicitor General emphasized the unfairness to the party who prevailed below:

> [A]ction by this Court vacating a judgment of the court of appeals on account of subsequent mootness, although that judgment would not otherwise have been reviewed, is unfair to the party that prevailed in the court of appeals. Such a result needlessly deprives the respondent of any collateral benefits that might inure to it from the judgment, while at the same time conferring

> upon the petitioner an undeserved windfall that it could not have secured if the controversy had remained alive until such time as this Court passed upon the certiorari petition.

Brief for the United States in Opposition at 6, *Velsicol Chemical Corp. v. United States, supra,* No. 77-900.

The unfairness of providing appellant with a windfall is even greater in this case than in *Velsicol* and *Local 102*. In those cases, the petitioners unsuccessfully sought stays of the lower court orders,[7] but here appellant complied with the district court's order without attempting to maintain the status quo. If an appellant wishes to erase a district court's judgment, he should be required to take the necessary steps to preserve the status quo pending appeal. If he fails to do so, he should be required to live with the consequences of that judgment.

Although *Velsicol* and *Local 102* arose on petitions for certiorari rather than on direct appeal, the procedure which the government urged in those cases should be adapted at least to appeals where the appellant fails to seek a stay and complies with the district court's order, for in such cases the appellant has voluntarily surrendered his right to appeal. Thus, if this case were not moot and the Court would affirm the judgment below pursuant to Rule 16, or for any other reason decline to note probable jurisdiction, it should dismiss the appeal. As we demonstrate at pp. 14-22, *infra,* the decision of the district court is so clearly correct that it would be affirmed if it were not moot. However, quite apart from any appraisal of

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[7]Petition for a Writ of Certiorari at 4, *Velsicol Chemical Corp. v. United States, supra,* No. 77-900; Petition for a Writ of Certiorari at 5, *Local 102, International Ladies' Garment Workers' Union v. United States, supra,* No. 78-633.

the merits, the Court should dismiss this appeal because appellant is responsible for the case being moot. *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, supra,* 686 F.2d 720; *Cover v. Schwartz, supra,* 133 F.2d 541.

If, contrary to appellee's submission, the Court decides to vacate the judgment of the district court, it should remand for consideration of appellee's application for attorney's fees rather than order dismissal of the complaint, as appellant requests. Appellee's application is now pending before the district court, and there is no reason to foreclose further proceedings on that issue. *Doe v. Marshall,* 622 F.2d 118, 120 (5th Cir. 1980), *cert. denied,* 451 U.S. 993 (1981) ("a determination of mootness does not prevent an award of attorney's fees on remand").

II. IN THE ALTERNATIVE, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

If the Court concludes that the case is not moot, it should affirm the judgment of the district court. In *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969), the Court held that the First Amendment does not permit the government "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action. " *See NAACP v. Claiborne Hardware Co.,* 102 S. Ct. 3409, 3433-34 (1982); *Communist Party of Indiana v. Whitcomb,* 414 U.S. 441, 448 (1974). Since the Blitz amendment fails to draw "the critical line . . . between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,'" *Healy v. James,* 408 U.S. 169, 188 (1972), it is unconstitutional on its face.

Appellant does not argue to the contrary. Instead he argues that the district court should have ruled in his favor because (1) he should be permitted to interpret the statute to conform with the distinction required by *Brandenburg*, and (2) appellee failed to exhaust her administrative remedies. Neither argument has any merit.

A. The Narrowing Construction.

The district court properly ruled that the Secretary of Labor does not have the authority to re-write a Congressional enactment in a fashion that contradicts the plain language and the clear intent of the statute. With simplicity and plainness, the Blitz amendment excludes from participation in CETA programs "individuals who publicly advocate the violent overthrow of the Federal Government, or who have within the past five years, publicly advocated the violent overthrow of the Federal Government."

Appellant contends that Congress intended this proscription on advocacy to go only so far as *Brandenburg* permits. However, there is nothing in the statute to support this gloss, and the legislative history is directly to the contrary. Throughout the congressional discussion of the Blitz amendment, its sponsors made clear that they intended to exclude individuals who advocate the violent overthrow of the government without any reference to whether they advocate imminent violence and are likely to succeed in their advocacy. Congressman Daniel said that he wanted to exclude "individuals whose *stated policy* is the overthrow of our system." 126 Cong. Rec. H10572 (daily ed., Nov. 13, 1980) (emphasis added). Senator Riegle stated: "We all have a very strong feeling about anyone who would advocate the overthrow of our Government, and we would oppose that *in all forms.*" 126 Cong. Rec.

S16743 (daily ed., Dec. 15, 1980) (emphasis added). *See* 126 Cong. Rec. S16192 (daily ed., Dec. 11, 1980); 126 Cong. Rec. H12386 (daily ed., Dec. 12, 1980).

Furthermore, the evidence presented to the Congress in support of the Blitz amendment did not involve any advocacy of the sort to which the Secretary suggests the statute is limited. All that was presented to the Congress was that Dorothy Blitz is a member of the Communist Workers Party and that she had been quoted in the press as believing that the government will have to be overthrown and this revolution might have to be by force if necessary. 126 Cong. Rec. S16192 (daily ed., Dec. 11, 1980); 126 Cong. Rec. H12386 (daily ed., Dec. 12, 1980); 126 Cong. Rec. S16742 (daily ed., Dec. 15, 1980).[8]

In arguing that the district court should have accepted his narrowing construction of the amendment, appellant has confused the canons of statutory construction. This Court has repeatedly emphasized that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See Griffin v. Oceanic Contractors, Inc.*, 102 S. Ct. 3245, 3250, 3253 (1982). The language of the Blitz amendment could not be

[8]Congressman Daniel also told the Congress that appellee had been indicted on felony riot charges in connection with the Ku Klux Klan attack on a Communist Workers Party demonstration in Greensboro, North Carolina. 126 Cong. Rec. H10572 (daily ed., Nov. 13, 1980). Those charges did not arise from advocacy of violent revolution, and in any event the charges were dismissed. Second Affidavit of Dorothy Blitz, ¶ 's 11, 12 (March 23, 1982).

clearer, and the legislative history is entirely consistent with the statutory language. On that score alone, the Secretary's extensive revision of the statute must be rejected as contrary to the most fundamental principle of statutory construction.

The Secretary also argues that his narrowing construction is necessary to avoid a repeal by implication of the provisions of CETA which prohibit discrimination among participants on the basis of political affiliation or belief. 29 U.S.C. §§ 823(a)(1) and 834(a) (Supp. IV). While the Secretary is correct in asserting that repeals by implication are not favored, he overlooks the companion rule that a court "must read the statutes to give effect to each if [the court] can do so while preserving their sense and purpose." *Watt v. Alaska,* 451 U.S. 259, 267 (1981). Under this principle, the logical way to give effect to both the anti-discrimination provisions of CETA and the Blitz amendment is to conclude that the statutory frame-work prohibits discrimination on the basis of political belief, except where an individual advocates the violent overthrow of the government. *See Morton v. Mancari,* 417 U.S. 535, 549-551 (1974) (reconciling an anti-discrimination provision with a hiring preference based on race).

The fact that this reconciliation raises a constitutional issue does not justify resorting to a construction which is contrary to the statute's plain language and legislative history. "[I]t is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation." *Yu Cong Eng v. Trinidad,* 271 U.S. 500, 518 (1926). Since the Secretary's construction of the Blitz amendment is not faithful to the statute's

language and the express congressional intent, the district court properly rejected it.[9]

Finally, the Secretary relies on the principle that courts should accept narrowing constructions in order to avoid ruling that statutes are unconstitutional.[10] While this policy should be given effect whenever possible, courts are not free to ignore the plain language of a statute and Congress' clear intention in enacting it. "[R]esort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction." *Swain v. Pressley,* 430 U.S. 372, 378 n.11 (1977). As this Court stated in *United States v. Sullivan,* 332 U.S. 689, 693 (1948):

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[9]The Secretary also suggests that he has greater latitude to construe the Blitz amendment because it was enacted in an appropriations bill. This contention is rebutted by the decision in *United States v. Will,* 449 U.S. 200 (1980), where the Court confronted and decided novel and difficult constitutional issues which had been precipitated by legislation enacted through appropriations bills. "[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' . . . 'The whole question depends on the intention of Congress as expressed in the statutes.'" *Id.* at 222 (citations omitted). Thus, the fact that the Blitz amendment was enacted in an appropriations bill does not excuse the district court from facing the statute's plain meaning, even if that meaning required an adjudication of a constitutional issue.

[10]The Secretary also asserts that he is entitled to deference in the interpretation of a statute which he is responsible to administer. While this is true with respect to matters of program operation, the Secretary's judgment "is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution." *Piper v. Chris-Craft Industries,* 430 U.S. 1, 41 n.27 (1977). Indeed, "the constitutionality of a statutory requirement . . . is beyond [a cabinet officer's] jurisdiction to determine." *Weinberger v. Salfi,* 422 U.S. 749, 765 (1975). *See Public Utilities Commission of the State of California v. United States,* 355 U.S. 534, 539-40 (1958).

> A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question. [There is no authority for] a court in interpreting a statute to depart from its clear meaning. When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no [authority] justifies a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity.

The district court's ruling on the constitutionality of the Blitz amendment was consistent with this Court's decision in an analogous case, *Aptheker v. Secretrary of State,* 378 U.S. 500 (1964). There the Court held unconstitutional a section of the Subversive Activities Control Act of 1950 which prohibited anyone who was a member of a Communist organization, as determined by the Subversive Activities Control Board, to use or apply for a passport. In reaching this conclusion the Court rejected an argument – similar to the one which appellant makes in the instant case – that the Court should apply a narrowing construction to the statute.

> It must be remembered that "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ." or judicially rewriting it. [citation omitted] To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask

> whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

378 U.S. at 515.

In this case, just as in *Aptheker,* "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting." *Id.* The Blitz amendment does not present any problems of vagueness which might properly be cured by an administrative or judicial gloss. Its language and legislative history are perfectly clear and clearly unconstitutional. "It is precisely because [the] statute sweeps indiscriminately across all types of [advocacy], without regard to the quality and degree of [advocacy], that it runs afoul of the First Amendment." *United States v. Robel,* 389 U.S. 258, 262 (1967).[11] Since neither the Secretary of Labor nor the courts have the authority to engage in a legislative function, the district court properly ruled that the Blitz amendment is facially unconstitutional.[12]

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[11] In *Robel* the Court rejected the government's proffered narrowing construction with respect to another provision of the Subversive Activities Control Act of 1950.

[12] If accepted, the Secretary's narrowing construction would present a host of additional constitutional problems. First, it does not address appellee's contentions that the Blitz amendment is unconstitutional because it is a bill of attainder and because it retroactively penalizes speech which was legal when uttered. *See United States v. Brown,* 381 U.S. 437 (1965). Second, in order to determine whether a participant has engaged in proscribed advocacy, a prime sponsor would have to employ questions and investigations which would raise serious problems under the self-incrimination clause of the Fifth Amendment. *See Lefkowitz v. Cunningham,* 431 U.S. 801 (1977). Third, determinations with respect to arguably proscribed advocacy would raise difficult issues as to the measure of due process required before an administrative agency can punish a person. *See Mathews v. Eldridge,* 424 U.S. 319 (1976). Fourth, in order to accommodate participants in

B. Exhaustion of Administrative Remedies.

The Secretary of Labor asserts that appellee was not properly before the district court because she failed to exhaust her administrative remedies. This contention is without merit for three reasons.

First, the remedies prescribed by the statute, 29 U.S.C. § 816 (Supp. IV), and the regulations, 20 C.F.R. §§ 676.81-676.93 (1980), do not apply to the instant controversy because this grievance procedure applies only to complaints against prime sponsors. 29 U.S.C. § 816(a). It does not provide an avenue for a person who has a dispute directly with the Secretary over the constitutionality of any portion of the statute. *See CETA Workers' Organizing Committee v. City of New York,* 617 F.2d 926, 935 (2d Cir. 1980). Indeed, lower court decisions demonstrate that a plaintiff raising a constitutional issue under CETA need not exhaust administrative remedies and may present that claim to an appropriate district court. *Hark v. Dargon,* 477 F. Supp. 308 (D. Vt.), *aff'd,* 611 F.2d 11 (2d Cir. 1979); *Maloney v. Sheehan,* 453 F. Supp. 1131, 1136-1137 (D. Conn. 1978). *See CETA Workers' Organizing Committee v. City of New York, supra,* 617 F.2d at 934 n. 6.

Second, even if there were remedies for appellee to pursue in a controversy such as this, exhaustion should not have been required because it would have been futile. *Weinberger v. Salfi, supra,* 422 U.S. at 764-66. Faced with a statute as clear and precise as the Blitz amendment, the VEC was forced to exclude appellee because she has advocated the violent overthrow of the government, albeit in

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training programs who do not want to run afoul of the statute through their future advocacy, prime sponsors would have to establish some form of pre-clearance system which would raise all the sensitive procedural problems that accompany systems of prior restraint. *See Freedman v. Maryland,* 380 U.S. 51 (1965).

a manner protected by the First Amendment. Moreover, the Secretary's suggestion (J.S. 15) that he might have averted this controversy if appellee had come to him rather than filing suit is disingenuous. The Secretary took no action to issue a limiting construction when the statute was enacted, when the VEC asked him for guidance, or when appellee applied to him for assistance. The Secretary arrived at his limiting construction of the Blitz amendment only after this lawsuit commenced, and events prior to the suit demonstrate the futility of exhausting administrative remedies.

Third, in addition to futility, there are additional reasons why this is not an appropriate case to require the exhaustion of administrative remedies. "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson,* 405 U.S. 34, 37 (1972). This case involved no issues within the Secretary's special competence nor any factual questions. The fact that appellee has engaged in advocacy which comes within the ambit of the Blitz amendment was undisputed. (App. at 2a, 4a.) The only question was the constitutionality of the statute, and on this issue the federal courts rather than executive branch officials have special expertise. *See* note 10, *supra. Cf. Steffel v. Thompson,* 415 U.S. 452, 472-73 (1974) (exhaustion not required in cases under 42 U.S.C. § 1983 in recognition of "the paramount role Congress has assigned to the federal courts to protect constitutional rights.") Finally, there was no occasion for the Secretary to correct any errors, for prior to suit he simply refused to take a position on the Blitz amendment.

CONCLUSION

For the reasons stated above, the Court should dismiss the appeal. In the alternative, if the Court concludes that the case is not moot, it should affirm the judgment of the district court.

Respectfully Submitted,

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December 4, 1982

APPENDIX A

TELEGRAPHIC MESSAGE

Name of Agency
U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
P.O. BOX 8796, PHILA., PA. 19101

ACTION: Rush

Date Prepared
May 19, 1982

Name
FRANCIS R. ZINNIE

Phone Number
596-6236

TO:
Mr. Ralph C. Robinson
Associate Commissioner
Virginia Employment Commission
111 South Sixth Street
Richmond, Virginia 23210

Subject: Blitz Versus U.S. Government

A recent District Court decision in the Blitz vs. U.S. Department of Labor case enjoined the Department to process Ms. Blitz's CETA application without regard to her political leanings or opinions. Therefore, you are to immediately inform Martinville [sic] local office to process Ms. Blitz CETA application without regard to political considerations.

James L. Whitsett
Grant Officer

Page No. No. of Pgs

cc: S. Baker 1 1

Supreme Court, U.S.
FILED
JAN 4 1983
ALEXANDER L. STEVAS
CLERK

No. 82-611

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN,
SECRETARY OF LABOR, APPELLANT

v.

DOROTHY BLITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE APPELLANT

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Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1982

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RAYMOND J. DONOVAN,
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v.

DOROTHY BLITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE APPELLANT

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1. Appellee agrees that this case is moot because she has completed the job training program to which she sought admission and therefore has received "all the relief she sought." Mot. to Dis. 1, 7-8.[1] Appellee contends only that

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[1]In particular, appellee specifically does not contend that her enrollment in a job training program in New York prevents this case from being moot. See Mot. to Dis. 10-11 & n.6.

For essentially the reasons stated by appellee (Mot. to Dis. 5-6 & n.2), we agree that the expiration of the Comprehensive Employment and Training Act (CETA) is not an independent ground for finding this case moot. The Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1354, establishes a program that is similar to CETA in some respects. The Daniel Amendment was continued in effect by Pub. L. No. 97-377, enacted December 21, 1982, and because of Section 181(a) of the Job Training Partnership Act, the restriction imposed by the Daniel Amendment applies to funds spent under that Act.

We note also that this case appears to have become moot after an appeal was taken to this Court. Compare J.S. 8 n.5 with J.S. App. 14a.

the Court should dismiss the appeal instead of vacating the judgment of the district court and remanding the case with instructions to dismiss the complaint as moot.

This case became moot because the Secretary complied with the district court's injunction — which required him "immediately [to] undertake all appropriate steps to insure that [appellee's] application for employment training * * * is processed without regard to" the Daniel Amendment (J.S. App. 13a) — and ordered appellee admitted to the CETA program. Appellee cites no case that became moot for this reason in which an appellate court dismissed the appeal. Appellee relies principally on *Cover* v. *Schwartz*, 133 F.2d 541, 543-547 (2d Cir.), cert. denied, 319 U.S. 748 (1943), and *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982). But in neither of these cases did the cause become moot because the defendant complied with an injunction. In both cases, the appellant simply "abandoned [his] contention" on appeal (133 F.2d at 544) — in *Cover* apparently for tactical reasons, and in *Ringsby* because the case was settled by an agreement between the parties that provided for the appeal to be dismissed and did not require the vacation of the district court's order (see 686 F.2d at 721-722).[2]

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[2]Of the other cases cited by appellee (Mot. to Dis. 10 n.4), in *Curtis* v. *Taylor*, 625 F.2d 645, 648 (5th Cir. 1980), *Taylor* v. *United States*, 410 F.2d 392 (5th Cir. 1969), and *Bingham* v. *Yingling Chevrolet Co.*, 297 F.2d 341 (10th Cir. 1961), the appellant took an action that mooted the appeal even though the district court's order apparently did not require him to do so before the appeal was decided. See, *e.g.*, 625 F.2d at 648 (appellant "could have waited until this court had determined the merits of the appeal before" complying with district court's order); 297 F.2d at 342 ("[P]ayment [by appellant of a debt he unsuccessfully attempted to have discharged in district court] was made voluntarily and was accepted. * * * [N]either [appellant] nor any one else is trying to get the money back.") By contrast, the district court's order in this case required the Secretary "immediately" to ensure appellee's admission to the CETA program (J.S. App. 13a). In *In Re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977), the district court's decision left the *appellee* free to act in a way that made the case moot, and the appellant did not prevent the appellee from so acting.

By contrast, in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), and *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979), defendants acted as the Secretary did here — they complied with the lower court's orders, as they were required to do, pending further review. This Court, upon determining in each case that the cause was moot because the plaintiff had received all the relief he requested, ordered the judgment of the lower court vacated. See 416 U.S. at 320; 442 U.S. at 94. As we explained (J.S. 8-9), some Justices dissented, for reasons that are inapplicable here, from the holding that *DeFunis* was moot; but none questioned the premise that if the case was moot, the proper disposition was to vacate the lower court's judgment, not simply to dismiss the petition. None urged that the party seeking review, by complying with the lower court's decision, had somehow forfeited his right to have that decision reviewed and, if appropriate, vacated as moot.

Indeed, this Court appears to have considered and rejected an argument similar to appellee's in *Brownlow* v. *Schwartz*, 261 U.S. 216 (1923). That case became moot because the appellant, a government official, complied with the lower court's order, while appealing it, even though he was not required to do so. The Court nonetheless did not dismiss the writ of error but "reversed" and ordered the case dismissed. *Id.* at 218-219. The Court explained (*id.* at 218): "It is urged that the [appellant acted] only because he believed it was incumbent upon him to comply with the judgment of the Court of Appeals and avoid even the appearance of disobeying it. The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate." In addition, as appellee acknowledges (Mot. to Dis. 9 n.3), in *New Left Education Project* v. *Board of Regents*, 472 F.2d 218 (5th Cir. 1973), the court of appeals followed a course similar to

that advocated by appellee here — although again in a case in which the defendant complied voluntarily with the district court's order and was under no compulsion to do so —and this Court summarily overturned the court of appeals' decision. 414 U.S. 807 (1973).[3] In this case, moreover, the Secretary complied with the district court's order not voluntarily but because he would have been in contempt had he not done so.

As appellee recognizes, the only alternative to the course the Secretary pursued here would have been to seek a stay of the district court's decision. Indeed, appellee appears to concede that the disposition we request would be appropriate if the Secretary had sought a stay. See Mot. to Dis. 13. But often, as in this case, the "equitable balance between the parties" (*Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1309 (1973) (Marshall, Circuit Justice)) will not warrant an application for a stay, even if the case will become moot in the absence of a stay; that is because the harm to the government's interests that results from exempting a single party from the requirements of a federal statute pending further review can be quite limited. Cf. *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347 (1977) (Rehnquist, Circuit Justice). If we had sought a stay in this case, appellee presumably would have opposed it on precisely that ground. In general, it is obviously not in the interest of any party, or of the Court, to require an appellant or petitioner to file an unwarranted stay application in a case destined to become

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[3]Appellee attempts to explain *New Left Education Project* by suggesting that the Court was "influenced by considerations of federalism since the district court's order had the effect of enjoining a state court proceeding over the same subject matter" (Mot. to Dis. 9 n.3). Because the district court in this case declared unconstitutional an Act of Congress, considerations at least as substantial militate against allowing the judgment below to stand unreviewed.

moot (or in every case that might possibly become moot) solely in order to preserve his right to have the lower court's judgment vacated.[4]

2. Appellee does not deny that if the Daniel Amendment were interpreted in the way specified by the Secretary, it would be constitutional. Instead, she insists (*e.g.*, Mot. to Dis. 15) that the Secretary lacks authority to interpret the Amendment in this way. But the remarks of members of Congress cited by appellee (*ibid.*) shed no light on how Congress intended to define the phrase "publicly advocate the violent overthrow of the Federal Government"; by contrast, as we noted (J.S. 10), Senator Warner — who introduced the Amendment in the Senate, and whom appellee acknowledges as a leading proponent of the Amendment (Mot. to Dis. 4-5) — specifically referred to "a series of court decisions which pretty well characterize those remarks which would be considered advocating the violent overthrow of the U.S. Government." Similarly, Congress cannot be taken to have prejudged appellee's specific case merely because general facts about her were mentioned during congressional debates (Mot. to Dis. 3-5, 16).

Appellee also invokes the language of the Daniel Amendment (Mot. to Dis. 16-17), but she does not discuss such decisions as *Yates* v. *United States*, 354 U.S. 298, 319

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[4]Appellee cites our Briefs in Opposition in *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-990, 1977 Term), and *Local 102, International Ladies' Garment Workers' Union* v. *United States*, 439 U.S. 1070 (1979) (No. 78-633, 1978 Term). Our argument in those cases, however, relied on the fact that the party seeking review was invoking only this Court's discretionary jurisdiction and did not have a right to obtain review. See 77-990 Br. in Opp. 5 & n.4; 78-633 Br. in Opp. 4 n.4. In this case, we have invoked the Court's mandatory jurisdiction under 28 U.S.C. 1252, and appellee does not deny that the Court has jurisdiction under that provision. In any event, because the district court declared an Act of Congress unconstitutional, and our arguments in defense of that statute are plainly substantial, the Court would undoubtedly have granted plenary review if the case were not moot.

(1957), *Dennis* v. *United States*, 341 U.S. 494, 499-502 (1951) (plurality opinion), and *Scales* v. *United States*, 367 U.S. 203, 221-222, 228-230 (1961), in which the Court ruled (see J.S. 10) that the term "advocate" is not to be construed as having its "ordinary dictionary meaning" but "carr[ies] a special and limited connotation" that conforms to constitutional requirements (*Yates* v. *United States*, *supra*, 354 U.S. at 319).

3. Appellee appears to contend (*e.g.*, Mot. to Dis. 22) that she should be excused from the requirement of exhausting administrative remedies because the Secretary did not anticipate her complaint and announce his construction of the Daniel Amendment before she brought suit, and because she wrote a letter to him asking for relief one week before she sued. But as we explained (J.S. 2-3), Congress established, under CETA, a grievance procedure that contemplated a hearing before the prime sponsor followed by an investigation by the Secretary and, if appropriate, a hearing before the Secretary. Appellee does not contend that she invoked these remedies, and she points to no statute or regulation requiring the Secretary to issue interpretations of disputed provisions of CETA before they are brought before him in a specific controversy according to the procedures specified in the Act. Nor does appellee cite any statute or regulation requiring the Secretary promptly to answer requests for relief that bypass the remedies established by Congress. By the same token, appellee's assertion (Mot. to Dis. 21) that "exhaustion should not have been required because it would have been futile" in light of "a statute as clear and precise as" the Daniel Amendment is belied by appellee's attempt (Mot. to Dis. 7) to persuade the

Secretary, albeit without resort to the established administrative procedure, to direct the VEC to process appellee's CETA application.[5]

For these reasons and the reasons stated in the jurisdictional statement, it is respectfully submitted that the judgment of the district court should be vacated and the case remanded with instructions to dismiss the complaint as moot.[6] If the Court determines that the case is not moot, probable jurisdiction should be noted.

REX E. LEE
Solicitor General

JANUARY 1983

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[5]Appellee cites (Mot. to Dis. 21) three cases which, she asserts, hold that the administrative remedies prescribed by CETA need not be exhausted. But in one of those cases, *CETA Workers' Organizing Committee* v. *City of New York*, 617 F.2d 926 (1980), the Second Circuit specifically held that exhaustion *was* required (*id.* at 935-936), and noted (*id.* at 934 n.6) that its earlier decision in *Hark* v. *Dragon*, 611 F.2d 11, aff'g 477 F. Supp. 308 (D. Vt. 1979), which appellee also cites, did not consider the exhaustion issue. In *Maloney* v. *Sheehan*, 453 F.Supp. 1131 (D. Conn. 1978), it appears that the failure to exhaust administrative remedies was not raised as a defense. See *id.* at 1136-1137.

[6]We do not intend to suggest that the district court would lack the power to act on appellee's application for attorney's fees.